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IN THE

Supreme Court of the United States

October Term, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION, *Respondents*

NO._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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I. The Court of Appeals erroneously assumed controverted facts and then, based on such assumed facts, decided the threshold question as a matter of law that Martin had no business or property which could be the subject of injury under Section 4 of the Clayton Act (15 U.S.C. Section 15). On that holding the Court of Appeals affirmed the District Court without discussing the remaining issues. (See Appendix C.)	20

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A. The Court erroneously assumed that Martin's option from Jett was so "burdened with infirmities" (Appendix A, p. 10) and that his relationship with Bank was so tenuous that Martin had no "property" within the meaning of the Clayton Act (15 U.S.C. Section 15). 20

B. The Court further erroneously assumed that Martin was unprepared to "either enter the new business (of gas processing) or to expand his existing business to include the gasoline plant purchase and operation" (Appendix A, pp. 9-10) and thus had no "business" within the meaning of Section 4 of the Clayton Act (15 U.S.C., Section 15). 20

1. The Court of Appeals was in error because Martin's right to exercise his option was not conditioned on expansion of plant capacity. 21

2. The Court of Appeals was in error because the reserves were adequate for Martin's financing by Bank. ... 22

3. The Court of Appeals was in error because Bank's financing Martin was not conditioned (i) on a reserve report by DeLaat supporting a throughput of 40,000 mcfd, or (ii) on Jett's agreement to subordinate his interest. 23

4. The Court of Appeals was in error because Bank had no right to give Martin's deal to Phillips. 25

5. The Court of Appeals was in error because Martin was able to operate the plant. 25

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6. The Court of Appeals was in error because Martin had the ability to finance the acquisition. 25

7. The Court of Appeals was in error because if Martin was a "mere finder" he nonetheless had "business or property". 26

8. The Court of Appeals was in error because Martin's recognized option was valid. 27

II. This Court has never written on the meaning of the phrase "business or property" contained in Section 4 of the Clayton Act (15 U.S.C., Section 15) and such action is important to the private administration of the antitrust laws. 28

III. The decision in this case of the Court of Appeals for the Fifth Circuit on "business or property" is in conflict with decisions of other courts of appeals. 29

IV. The holding of the Court of Appeals erroneously affirming the summary judgment of the District Court which held that the actions of the respondents were not violations of the antitrust laws and in failing to hold that such actions did, as a matter of law, constitute such violations, is in conflict with the decisions of this Court and other Courts of Appeals. 32

A. The holding is in conflict with decisions holding such actions constitute unlawful exclusion of a competitor from substantial participation in a market in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1). 32

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B. The holding is in conflict with decisions holding such actions constitute a boycott in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1). 34

C. The holding is in conflict with decisions holding actions such as those of Bank in tying to the availability of its credit in Martin's behalf that he accept Phillips as dominant interest owner-operator of the plant and marketer of its products constitute unlawful tying arrangements in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1). 36

D. The decision is in conflict with decisions holding that predatory combinations and conspiracies such as that between Bank and Phillips, the leading producer nationally of LPG products and a substantial seller in an oligopolistic relevant market, constitute attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2). 37

E. The decision is in conflict with other decisions holding that actions such as that of Phillips, a substantial existing competitor in the already oligopolistic Locust Ridge relevant market, in acquiring the assets of the competitive Locust Ridge corporations, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Section 18). 39

V. The denial of discovery as affirmed by the Court of Appeals is contrary to the decisions of this Court and other Courts. 40

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IN THE

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October Term, 1966

ROBERT H. MARTIN, *Petitioner*

v.

PHILLIPS PETROLEUM COMPANY, CHEMICAL BANK, NEW YORK TRUST COMPANY, TEXAS SAN JUAN OIL CORPORATION, TENSAS GAS GATHERING CORPORATION, BART DeLAAT and BART DeLAAT AND ASSOCIATES, INC., GAS INDUSTRIES MANAGEMENT CORPORATION and GASOLINE PLANT CONSTRUCTION CORPORATION, *Respondents*

NO._____

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioner ROBERT H. MARTIN (Martin), prays that this Court issue its Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit, to review the judgment entered in the above case on July 26, 1966, affirming the summary judgment of the United States District Court for the Southern District of Texas. (Appendix A, p. 12)

OPINIONS BELOW

The United States District Court for the Southern District of Texas, Houston Division, rendered an unreported memorandum decision on the 25th day of January, 1965 (Appendix B) granting respondents'[1] Motions for Summary Judgment and denying Martin's Motion for Summary Judgment on the issue of liability. The opinion of the United States Court of Appeals for the Fifth Circuit (Appendix A) affirming the District Court is reported at _____ F.2d_____.

JURISDICTION

The judgment of the Court of Appeals for the Fifth Circuit was rendered July 26, 1966. The jurisdiction of this court is invoked under 28 U.S.C. Sections 1254(1) and 1651. Jurisdiction in the district court was based on federal questions arising under Sections 1 and 2 of the Sherman Antitrust Act (15 U.S.C., Sections 1 and 2), and Sections 4 and 7 of the Clayton Act (15 U.S.C., Sections 15 and 18).

QUESTIONS PRESENTED

1. Whether it was proper for the Court of Appeals in affirming the summary judgment of the district court to assume controverted facts and hold as a matter of law that petitioner Martin had neither "business or property"

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[1] An abbreviated reference will hereafter designate respondents, namely, Phillips Petroleum Company as Phillips; Chemical Bank New York Trust Company as Bank; Texas San Juan Oil Corporation as Texas San Juan; Bart DeLaat and Bart DeLaat and Associates, Inc., as DeLaat; Gasoline Plant Construction Corporation as Gasoline Plant, Tensas Gas Gathering Corporation as Tensas and Gas Industries Management Corporation as Gas Industries.

within the meaning of Section 4 of the Clayton Act. (15 U.S.C. Section 15).

2. Whether the Court of Appeals erred in failing to hold as a matter of law that Martin, an independent oil and gas operator, with an option to purchase a gasoline plant and related facilities and expand his oil and gas operations, which acquisitions and expansions were in the final stages of financing by Bank, had such "business or property" as entitled Martin to maintain an action for damages resulting from a predatory combination and conspiracy between Bank and other respondents, whereby respondents appropriated the properties covered by the option and prevented Martin from expanding his business.

3. Whether the Court of Appeals erred in affirming the holdings of the district court that the actions of Bank, Phillips and other respondents in secretly undermining Martin's negotiations, assuming an authoritative role with respect to his proposition and by Bank tying the services of Phillips as operator and marketer to the extension or availability of its credit in Martin's behalf, did not constitute a violation of Section 1 of the Sherman Act, (15 U.S.C., Section 1), as either: (1) an unlawful combination foreclosing Martin from the marketing of substantial LPG and other products in commerce; or (2) a boycott; or (3) a tying arrangement in violation of such section and in affirming the district court's failure to hold that such actions by respondents did, as a matter of law, constitute such violations.

4. Whether the Court of Appeals erred in affirming the holding of the district court that the actions of Phillips as the leading producer nationally of liquid petroleum gas (LPG) products, and as a substantial seller in the oligopolistic Locust Ridge relevant market, particularly in view

of the predatory nature of its conduct in combination with Bank and other respondents, did not constitute an attempt to monopolize or a conspiracy to monopolize the marketing of any part of LPG products and in affirming the district court's failure to hold that such conduct of Phillips did, as a matter of law, constitute such violation.

5. Whether the Court of Appeals erred in affirming the holding of the district court that the acquisition by Phillips, the largest producer of LPG products in the United States and a substantial existing competitor in the relevant market, of the assets owned and operated by Tensas and Gas Industries including the right to market the LPG products from the Locust Ridge plant, did not constitute a violation of Section 7 of the Clayton Act, (15 U.S.C. Section 18), and in affirming the district court's failure to hold that such acquisition of assets by Phillips did, as a matter of law, constitute such violation.

6. Whether there exists genuine issues of material fact with respect to any controlling combination of questions 1 through 5?

7. Whether it was appropriate for the Court of Appeals to affirm the summary judgment of the trial court dismissing Martin's complaint when the trial court had denied Martin effective discovery of critical documents and crucial economic data in Bank's and Phillip's control.

FEDERAL STATUTES INVOLVED

28 U.S.C. Section 1254(1), a jurisdictional section, reads in relevant part:

> "By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree . . ."

28 U.S.C. Section 1651, another jurisdictional section, reads in relevant part:

> "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law."

Martin charged respondents with violating Sections 1 and 2 of the Sherman Act, (15 U.S.C. Sections 1 and 2). For these violations Martin sought to recover treble damages under Section 4 of the Clayton Act, (15 U.S.C. Section 15).

Section 1 of the Sherman Act, (15 U.S.C. Section 1), in relevant part, reads as follows:

> "Every contract, combination in the form of trust or otherwise, or conspiracy in restraint of trade or commerce among the several states, or with foreign nations, is declared to be illegal . . ."

Section 2 of the Sherman Act, (15 U.S.C. Section 2), in relevant part, reads as follows:

> "Every person who shall monopolize, or attempt to monopolize, or combine or conspire with any other person or persons, to monopolize any part of the trade or commerce among the several states, or with foreign nations, shall be deemed guilty of a misdemeanor . . ."

Section 4 of the Clayton Act, (15 U.S.C. Section 15), in relevant part, reads as follows:

> "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor in any district court of

> the United States in the district in which the defendant resides or is found or has an agent, without respect to the amount in controversy . . ."

Martin also charged Phillips, in combination with Bank and other respondents, with the acquisitions of assets of Locust Ridge corporations under conditions that constituted a violation of Section 7 of the Clayton Act. (15 U.S.C. Section 18). Section 7 is relevant to Question No. 5 and reads in relevant part as follows:

> "No corporation engaged in commerce shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of another corporation engaged also in commerce, where in any line of commerce in any section of the country, the effect of such acquisition may be substantially to lessen competition, or to tend to create a monopoly.
>
> "No corporation shall acquire, directly or indirectly, the whole or any part of the stock or other share capital and no corporation subject to the jurisdiction of the Federal Trade Commission shall acquire the whole or any part of the assets of one or more corporations engaged in commerce, where in any line of commerce in any section of the country, the effect of such acquisition, of such stocks or assets, or of the use of such stock by the voting or granting of proxies or otherwise, may be substantially to lessen competition, or to tend to create a monopoly."

STATEMENT OF THE CASE

A. *Procedural Background*

This is an antitrust treble damage action brought by Martin against respondents, trial by jury having been de-

manded at the time of filing the original complaint. (R. 17-39, 557-580) After most of the depositions had been completed, but with Martin's being denied certain crucial documents and other information, respondents moved for summary judgment. (R. 581, 682, 684, 687, 690, 872) Martin answered denying respondents' right to summary judgment, alleging the total undisputed facts entitled him to judgment on the issue of liability, but, in any event, asserting the existence of numerous specific material fact issues, and finally that discovery had not been completed and summary judgment was premature. (R. 697-713, 856-870) Subject to such answer, Martin made a cross-motion for summary judgment on the issue of liability only. (R. 693-696) The district court, in a memorandum decision dated January 25, 1965, granted respondents' motions for summary judgment and denied Martin all relief. (Appendix B)

Martin then appealed to the Court of Appeals for the Fifth Circuit urging the points set forth in Appendix C. The Court of Appeals reached only a threshold question, concluding that Martin had neither business nor property injured by the alleged combination and conspiracy of respondents and refused to discuss or decide the other issues presented. (Appendix A) There was thus left outstanding the wholly unsatisfactory and inadequate discussion and holdings of the trial court on the issues involved. (Appendix B)

B. *Martin-Jett and Martin-Bank Relationships*

About 1959, the Locust Ridge gasoline plant situated in the vicinity of various gas fields in eastern Louisiana began operation. The plant processed raw natural gas produced in western Mississippi and eastern Louisiana, its products being natural gasoline, liquid petroleum gases (LPG's) and dry

or residue gas, which products are of substantial value and move in interstate commerce.[2] (R. 560, 562, 570, 574-575, 629, 630, 640, 648, 651, 652, 657, 660, 661, 760-761, 950; Appendix B, pp. 1-2)

The owners desired to sell the plant and its appurtenant facilities and assets. Jett, an independent oil and gas operator of Shreveport with substantial shut-in gas wells and 30,000 acres of undeveloped leases in the plant area, took an option to purchase the properties with the hope of expanding the plant to provide a market for his shut-in gas. (R. 560-561, 629-630, 647-648, 657, 757-758, 874-876, 895-907, 1514)

Martin became interested and in November, 1960, Jett made a firm proposal to Martin. Late in November while in Bank's New York offices on other matters, Martin advised H. C. Bailey, a vice-president of Bank, that Martin had an opportunity to acquire a gas processing plant. (R. 144, 876, 950, 998-1000, 1159-1160; Martin Dep. Ex. DM-46; Appendix B, p. 2)

Bailey's interest was immediate and intense because Bank controlled Texas San Juan, a corporation hopelessly in debt to Bank, which had a large tax loss incurred in oil and gas offshore drilling operations. Bailey had been instructed to

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[2] There is no question that interstate commerce is involved nor that such commerce is substantial. Phillips projected income from the properties for the last quarter of 1961 at $810,000.00, made up of sales of $73,000.00 from 12# gasoline, $128,000.00 of LPG's, $43,000.00 of distillate, and residue gas sales to Olin Transmission Corporation of $244,000.00 and American Louisiana Pipeline Company of $262,000.00, and for 1962 the corresponding sources would yield $510,000.00 from LPG's, $293,000.00 from 12# gasoline, $172,000.00 from distillate, gas sales of $975,000.00 to Olin, $1,057,000.00 to American Louisiana and miscellaneous income of $239,00.00, for a total of $3,247,000.00. (R. 1628, 1510-1515; McCullough Dep. Ex. P Mc-40)

look for just such a gas processing plant against whose income Texas San Juan could utilize its tax loss. (R. 950-951, 1000-1011, 1102-1110, 1160, 1162, 1456; Appendix B, p. 2)

Bailey pressed Martin to submit more information which Martin did while at the same time intensifying his negotiations with Jett for a sub-option. By mid-December Bailey and Bank's geologist, Dr. Anderson, traveled to Houston to meet with Martin and concluded the basic terms. (R. 950-951, 980-983, 1014-1020, 1160-1162; Appendix B, pp. 2-3)

It was at this time agreed between Martin and Bailey: (1) that Martin would operate the plant and market its products; (2) that Martin would give up a half interest in the properties in exchange for total financing by Bank; (3) that title to the properties would be taken in Texas San Juan to utilize its tax loss; and (4) after payout of the loans the residual interest would be owned equally between Martin and Bank subject to Jett's interest. (R. 951, 1018-1020, 1169-1172, 1396, 1502; Appendix B, pp. 2-3)

Martin acquired a sub-option from Jett, obtained feasibility studies from Gasoline Plant and reserve reports from Ogier, an independent Shreveport petroleum engineer, and met at Bank's offices the first week in January, 1961. Bank wanted DeLaat of Houston, whom it frequently employed, to check Ogier's reserve figures. To permit this check, Martin, with Bank's assurances to Jett, obtained an extension of the Martin-Jett option from January 10th to the close of business January 16, 1961. (R. 950-951, 1025-1027, 1112-1113, 1131-1138, 1163-1169, 1457-1497; Martin Dep. 347-365, 373-374; Weiler Dep. 392-393; Zwick Dep. 137, 139, 172-173; Bailey Dep. Ex. PB-12, 15-19, 21, 23, 24; Martin Dep. Ex. DM-16, 17; Appendix B, pp. 2-3)

C. *The Combination and Conspiracy*

For quite some time Bank, the fifth largest bank in the United States, had a substantial deposit relation with Phillips, the nation's leading processor of natural gas. Bailey of Bank in furtherance of his financial connections with Phillips, called Stradley, Phillips' financial vice-president, on January 12, 1961, and offered Phillips an opportunity to participate in Locust Ridge. Martin was not advised nor aware of this move by Bank. This call was made although Bailey had assured Martin, apparently moments before, that the financing was progressing to conclusion satisfactorily, and that Zwick, Bank's oil and gas manager, was arriving in Houston the next day. Bank's proposal to Phillips, being out of Stradley's department, was referred to McCullough, Phillips' vice-president in charge of gasoline plant acquisitions and operations, who was requested to call Bailey on the morning of Friday the 13th. (R. 89, 140, 576, 641, 951-952, 1027-1032, 1110-1113, 1131-1138, 1173-1187, 1254-1258, 1374-1376, 1393-1394, 1435-1443; Martin Dep. Ex. DM-16, 17; S.W. Bell Tele. Co. (Dallas) Dep. Ex. A-35; Appendix B, p. 3)

McCullough was immediately interested in Bailey's proposal because the plant and properties had long been coveted by Phillips. To this end:

(i) Phillips had considered building the plant in 1957, and

(ii) being unsuccessful had attempted to acquire an interest in the plant while it was being built.

(iii) Even after the plant was built, Phillips sought to purchase its liquids but the owners refused to sell Phillips an interest in either the plant or its liquids.

(iv) Early in 1960 the owners offered the plant to Phillips for $2,000,000.00 (the price which Phillips and Bank later paid for the plant) but the 1960 offer was rejected by Phillips because it was then considered overpriced.[3]

McCullough intensively reviewed the latest information on the Locust Ridge area to the point that when McCullough called Bailey on the 13th, he was fully prepared to make a firm offer of participation to Bank. Bailey for Bank and McCullough for Phillips then agreed (1) that Phillips be plant operator; (2) that Phillips would have a half interest after payout; and (3) would have the right to market the LPG's the plant produced. This substantially ousted Martin from his own deal. Also discussed was the Martin-Jett option and its short time limitations. Phillips and Bank representatives then arranged to meet on Monday the 16th at Phillips' Houston offices.[4] (R. 951-952, 1032-1040, 1254-1274, 1288-1292, 1300-1301, 1350-1356, 1377-1391; Ringham Dep. 144-151; Stradley Dep. 33-42; S.W. Bell Tele. Co. (Bartlesville) Dep. Ex. VII-10; Appendix B, p. 3)

Bailey then called Martin, and informed him of the Phillips contact.[5] Bailey stated Bank had no choice but to

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[3] Thus, as a result of the combination and conspiracy with Bank against Martin, and the use of the tax loss, Phillips was able to achieve on Friday the 13th what it had been unable to accomplish since 1957. (R. 759, 1060-1061, 1065-1067, 1310-1316, 1510; Arnsberger Dep. 39-43; Goth Dep. 12-17, 65-67; McCullough Dep. 18, 22-25; Ringham Dep. 75-76, 80-83, 85-89, 135-140)

[4] The clear purpose of the planned meeting of the 16th in Houston as described by Zwick ". . . was to see if we could get—arrive at some sort of an agreement to get Phillips into the deal with the rest of us, . . ." whereby Phillips would be "Operator of the plant and participate in it." (R. 1443)

[5] Bailey later conceded to Martin's associate Weiler that Bank "pulled" Phillips in. (R. 1192-1194, 1435, Martin Dep. Ex. DM-20, 20-A.)

join in the agreement with Phillips. Martin, taken aback, expressed shock and amazement. Bailey assured Martin there would be no deal without Phillips and advised Martin to take no action until Bailey arrived in Houston and could discuss the matter with Martin. (R. 1188-1190.)

On Sunday, January 15th, Martin's associate Weiler discussed the reserves study with DeLaat's office and was assured the reserves were favorable. But all other efforts by Martin to meet with Bailey, Zwick or Dr. Anderson of Bank were futile. (R. 1198-1199, 1398-1400, 1443-1445.)

Sunday afternoon, a Phillips negotiating team headed by McCullough was assembled in Bartlesville and flown to Houston on a company plane. This team included Ringham, head of joint ventures and plant acquisitions; Blume, an attorney; Edwards, a reservior engineer; Weaver, a gasoline plant engineer; and, because of the great importance of utilizing the tax loss, Baldwin, Phillips' tax consultant, who took extensive notes on the 12th, 13th, 15th and 16th, including meetings with Bank on the 16th, to which the district court denied petitioner access. (R. 535-547, 557, 987-995, 1274-1283, 1322-1328, 1331-1350, 1506-1508)

The last day of Martin's exclusive option, Monday, January 16th, began with a call from McCullough to Jett requesting Jett to come to Houston for the Bank-Phillips negotiations. Jett declined saying his agreement was with Martin. McCullough assured Jett that Phillips considered him a partner and would protect Jett's interests at the meetings. But Phillips made no effort to contact Martin. (R. 1141-1143, 1239, 1271-1275, 1299-1300)

About 9:30 A.M., on the 16th, the Phillips team and the Bank group consisting of Bailey, Zwick, Dr. Anderson, DeLaat and Gasoline Plant representatives, assembled at

Phillips' offices and conducted a systematic but unauthorized review of the Martin-Jett option, the Ogier reserves study, Gasoline Plant's plant and pipeline feasibility studies, all obtained by Martin and made available to Bank on a confidential basis. (R. 952, 985-987, 1040-1041, 1048-1050, 1053-1058, 1284-1285, 1295-1296, 1305-1308, 1356-1358, 1468-1480, 1498; Edwards Dep. 117-120, 128-134; McCullough Dep. 282-283; Zwick Dep. 223-225; Bailey Dep. Ex. PB-12; Appendix B, p. 4)

Hudson, nominal head of Texas San Juan, joined the meeting shortly before lunch and reported by phone to Martin on his way back to Dallas that Bank and Phillips were now treating Martin as a mere finder[6]; that Bank and Phillips were going to picture Martin's deal so poorly that it would not appear feasible; that the reserves were being downgraded and the whole deal torn apart. Hudson said he was powerless to protect Martin and had decided not to stay in town and "watch the goddamn' murder" of Martin's deal. (R. 1200-1201, 1499-1503, 1502)[7]

Repeated efforts by Martin to meet with Bank throughout the 16th were fruitless until late in the afternoon when he was permitted to attend the Bank-Phillips meeting. At this time about an hour remained before Martin's exclusive

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[6] Hudson further told Martin the Phillips-Bank group said he had contributed nothing except about $10,000.00 worth of reports, and " 'what he really is is a finder here,' and I [Hudson] said, 'Well, that isn't what he was; in other words, with our deal as a finder of the last half of the financing, and in my estimation the tough half, he was entitled to a 50-50 deal even though we knew he wasn't putting up any money, he was, nevertheless, causing the financing to be arranged for which you earned your half.' " (R. 1503)

[7] Interestingly on deposition Hudson explained his purpose in so reporting to Martin was ". . . to excite a feeling of sympathy between Bob Martin and myself as against the ogre Phillips." (R. 1124)

option expired. (R. 952, 1199-1201, 1402, 1450-1451; Appendix B, p. 4)

When Martin arrived at the Bank-Phillips meeting, Hudson's predictions proved true. Martin was falsely told that Phillips was there in an advisory capacity to Bank;[8] that Ogier's reserves were too optimistic and could not support a plant *capacity*[9] of 40,000 mcfd or 30,000 mcfd;[10] that Phillips owned or controlled substantial quantities of the new gas reserves contemplated to be dedicated to the plant;[11] that Phillips had a lawsuit against the plant;[12] and that marketing the new residue gas to Mississippi Power and Light Company was not tenable.[13] Phillips then stated it could not advise

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[8] If anything is clear it is that Phillips was representing itself and had come to conclude a deal on the terms agreed to between Bailey and McCullough on the 13th. (R. 1299, 1277-1279, 1274-1275, 1267-1268, 1350-1351; Footnote 4, supra)

[9] Italics and parenthetical expressions throughout are those of petitioner unless otherwise indicated.

[10] This statement was false in two particulars. First: Edwards of Phillips admitted shortly after Phillips took over operations of the plant that Ogier's reserve report was conservative and pressed Ogier to increase his figures (R. 708, 760). Second: DeLaat and Edwards made their findings of insufficient reserves based on the improper standard of sustained **throughput**—not **capacity**—the effect of which was to increase Martin's burden by 20% over the requirements of the Martin-Jett option. (R. 492, 584, 588, 1051, 1059, 1434; Edwards Dep. 294, 303-04.) For the distinction between **throughput** and **capacity** see footnote 18, infra, page 22. This method of computation was used to downgrade Martin's deal as Hudson of Texas San Juan had predicted. (R. 1499-1503.)

[11] Phillips did not own any of the new gas, much less the processing rights on the gas. (R. 1503)

[12] While considering the Feazel-Wheless offer to sell the plant for $2,000,000.00 Phillips discovered the plant was being inefficiently operated and had merely requested the owners to improve plant efficiency. (R. 1213-1215, 1406-1407)

[13] Later Bank and Phillips disclosed Phillips' hypocrisy when they made the sale of excess residue gas from the new reserves to Mississippi Power and Light Company one of two express conditions precedent to the acquisition. (R. 1297-1298, 1522)

Bank to conclude Martin's deal, and his *exclusive* option, as it had been honored by Jett, expired. (R. 1287-1288, 1404-1411)

Jett indicated he would honor his option with Martin until January 25 on a *non-exclusive* basis so that Jett would be free to deal with the first bona fide offer presented. Martin sought desperately to interest others in his option but was unable to accomplish in a little over a week what had taken more than six weeks to accomplish with Bank. (R. 760, 877-878, 952, 1219; Appendix B, p. 2)

Phillips meanwhile, having successfully prevented the exercise of Martin's option, proceeded with dispatch early on January 17th to "pick up the pieces"[14] of Martin's shattered deal. By March 27, 1961, Phillips had physical possession of the plant, its related facilities and was totally operating the properties. On April 27, 1961, the deal was formally closed, as Jett put it, on substantially the same basis he had agreed to with Martin—with one exception: Phillips ended up where Martin began. (R. 574, 640, 760-761, 952-953, 1075-1080, 1143-1147, 1237-1245, 1247-1251, 1288-1292, 1298-1299, 1301, 1350-1356, 1358-1370, 1527-1624; Appendix B, p. 4)

D. *The size of Phillips as an LPG producer-processor and the enhancement thereof by the combination and conspiracy.*

In 1960-1961, Phillips was the largest processor of natural gas liquids in the United States, processing approximately

[14] As McCullough reported to Phillips' operating committee March 27, 1961: "The deal as proposed by this (Martin) group fell through and our department picked up the pieces and through subsequent negotiations have reached agreements whereby the bank (respondent Bank) or its nominees will supply all monies." (R. 1510)

11% thereof, and continued its first rank into 1962-1963. (R. 563-564, 575-576, 631-632, 641; Oil and Gas Journal Surveys for Natural Gasoline Plants, 1960-1963)

The properties which Phillips and Bank acquired consisted of " . . . the *entire stock and assets* of the Tensas Gas Gathering Corporation[15] and the *entire stock and assets* of the Gas Industries Management Corporation . . ." together with the plant, all of which properties (including Tensas' pipeline) are operated by Phillips under agreements, the terms of which practically give Phillips permanent control of the properties. (R. 1510-1515, 1550, 1563-1565)

The relevant market for Locust Ridge LPG products was defined by Goth of Phillips as northeastern Louisiana and the Mississippi Delta north of Greenville, Mississippi, and Phillips was a substantial competitor therein. (R. 1061-1064)

Phillips' percentage of the relevant market was about 12% in 1959, and declined, according to a Phillips' employee, to about 6% in 1961. When Phillips obtained marketing control of approximately 25,000 gallons per day of LPG products from the Locust Ridge plant, the marketers and their approximate percentages in the relevant market were: Propane Corporation, 12%; Tuloma, 12%; Phillips, 12%-15%; Anchor, 20%, Warren, 33%, or five sellers controlling approximately 90% of the LPG products sold in the relevant market.

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[15] Tensas' pipeline facilities were regulated by the Federal Power Commission. To avoid regulation of the plant, Phillips had three nominees hold ostensible title to the Tensas pipeline until after the Federal Power Commission authorized Tensas' connection to the new reserves Jett dedicated, after which Texas San Juan acquired title as it had to other properties, all of which remained subject to Phillips' complete control. (R. 382-383, 573, 639, 652, 661, 1516-1523, 1527-1624, 1630-1643)

Subsequent to Phillips' acquisition of marketing control over the Locust Ridge plant LPG's Tuloma, a wholly owned subsidiary of Standard of Indiana, and Propane became affiliated, leaving these marketers and their approximate percentages in the relevant market: Phillips, 12%-15%; Anchor, 20%; Tuloma-Propane, 24%; Warren, 33%, or four companies controlling approximately 90% of the LPG products sold in the relevant market. (R. 570-576, 638-641, 660, 760-761, 931-936, 1061-1073, 1080-1102.)

REASONS FOR GRANTING THE WRIT

Summary of Reasons

I.

The Court of Appeals erroneously assumed controverted facts and then, based on such assumed facts, decided the threshold question as a matter of law that Martin had no business or property which could be the subject of injury under Section 4 of the Clayton Act (15 U.S.C. Section 15). On that holding the Court of Appeals affirmed the District Court without discussing the remaining issues. (See Appendix C.)

A. The Court erroneously assumed that Martin's option from Jett was so "burdened with infirmities" (Appendix A, p. 10) and that his relationship with Bank was so tenuous that Martin had no "property" within the meaning of such section of the Clayton Act (15 U.S.C., Section 15).

B. The Court further erroneously assumed that Martin was unprepared to "either enter the new business (of gas processing) or to expand his existing business to include the gasoline plant purchase and operation" (Appendix A, pp. 9-10) and thus had no "business" within the meaning of Section 4 of the Clayton Act (15 U.S.C., Section 15).

II.

This Court has never written on the meaning of the phrase "business or property" contained in Section 4 of the Clayton Act (15 U.S.C., Section 15), and such action is important to the private administration of the antitrust laws.

III.

The decision in this case of the Court of Appeals for the Fifth Circuit on "business or property" is in conflict with decisions of other Courts of Appeals.

IV.

The holding of the Court of Appeals erroneously affirming the summary judgment of the District Court which held that the actions of the respondents were not violations of the antitrust laws and in failing to hold that such actions did, as a matter of law, constitute such violations, is in conflict with the decisions of this Court and other Courts of Appeals.

A. The holding is in conflict with decisions holding such actions constitute unlawful exclusion of a competitor from substantial participation in a

market in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

B. The holding is in conflict with decisions holding such actions constitute a boycott in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

C. The holding is in conflict with decisions holding actions such as those of Bank in tying to the availability of its credit in Martin's behalf that he accept Phillips as dominant interest owner-operator of the plant and marketer of its products constitute a tying arrangement in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

D. The decision is in conflict with decisions holding that predatory combinations and conspiracies such as that between Bank and Phillips, the leading producer nationally of LPG products and a substantial seller in an oligopolistic relevant market, constitute attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2).

E. The decision is in conflict with other decisions holding that actions such as that of Phillips, a substantial existing competitor in the already oligopolistic Locust Ridge relevant market, in acquiring the assets of the competitive Locust Ridge corporations, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Section 18).

V.

The denial of discovery as affirmed by the Court of Appeals is contrary to the decisions of this Court and other Courts of Appeals.

Restatement And Argument Supporting Reasons

I.

The Court of Appeals erroneously assumed controverted facts and then, based on such assumed facts, decided the threshold question as a matter of law that Martin had no business or property which could be the subject of injury under Section 4 of the Clayton Act (15 U.S.C. Section 15). On that holding the Court of Appeals affirmed the District Court without discussing the remaining issues. (See Appendix C.)

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B. The Court further erroneously assumed that Martin was unprepared to "either enter the new business (of gas processing) or to expand his existing business to include the gasoline plant purchase and operation" (Appendix A, pp. 9-10) and thus had no "business" within the meaning of Section 4 of the Clayton Act (15 U.S.C., Section 15).

To reach these conclusions the Court of Appeals erroneously assumed that (1) Martin's exercise of his suboption from Jett "was conditioned on the ability to expand the plant to a processing capacity of 40,000 mcf of gas per day" [Appendix A, p. 10]; (2) that the

reserves made it "impossible" to expand the plant to a 40,000 mcfd *capacity* [Appendix A, p. 10]; (3) that (i) "a favorable reserve report by DeLaat" and (ii) a subordination by Jett of "his net profits interest to the loan payments" were each "a condition precedent to any financing" by Bank [Appendix A, pp. 4, 11]; (4) that Bank had the right to give Phillips Martin's deal[16] [Appendix A, pp. 5, 11]; (5) that Martin was not able to operate a gasoline plant [Appendix A, p. 9]; (6) that Martin "did not have the ability to finance the business" Appendix A, p. 9]; (7) that "Martin was a finder" [Appendix A, p. 11], which status the Court obviously concluded did not constitute "property"; (8) that the law of Louisiana prevented Martin's option from being valid [Appendix A, pp. 9, 11].

1. *The Court of Appeals was in error because Martin's right to exercise his option was not conditioned on expansion of plant capacity.*

The facts are that Martin's option was complete. To get the properties he had only to exercise his option. Any obligation he had to expand the processing capacity of the plant became operative only after he had exercised his option and Jett had performed. The Martin-Jett option made this clear. After setting out certain obligations of Jett on dedication of reserves, the option provides (R. 1465):

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[16] The Court said "The Bank was seeking an experienced plant operator, gas reserves, and a product market. All three were available in Phillips." (Appendix A, p. 5). Again, "It is true that the Bank, in a sense, gave Mr. Martin's find to Phillips." (Appendix A, p. 11). The first of these statements seems to assume Bank had the right to barter with Martin's deal, and both, especially the latter, seem to be tacit recognitions that Martin had a "property."

> "*The Weiler Group*[17] *agrees that in the event it elects to acquire said properties and securities* optioned to it hereunder and does so acquire the same, it will, *promptly after you have fulfilled your obligation to dedicate reserves* and execute contracts as set forth in the preceding paragraph:
>
> (a) expand the *capacity*[18] of the Locust Ridge Gas Processing Plant to the end that it will be capable of processing 40,000 mcf of gas per day in lieu of its present daily capacity of approximately 25,000 mcf; . . . (emphasis supplied)

It will be noted from the above quoted language that the obligation to expand was dependent (1) on Martin's first acquiring the properties and (2) further dependent on the prior obligation of Jett to dedicate reserves.

Further support of this interpretation comes from Jett and his associate Anderson, both of whom state the expanded plant capacity was to be determined by reserves and not by assigning an arbitrary capacity (R. 758-759, 876-877).

2. *The Court of Appeals was in error because the reserves were adequate for Martin's financing by Bank.*

DeLaat had reported to Martin's associate Weiler on January 15, 1961, that Ogier's reserves had checked out

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[17] Included Martin.

[18] Crucial to this case is a clear understanding of the material difference between **capacity** and **throughput**. As used in the oil and gas industry, **capacity** usually means the maximum amount of raw gas that a gas plant can efficiently process without material waste. On the other hand, **throughput** has reference to the amounts of gas, actual or projected, to be delivered on a sustained basis to the plant. **Throughput** is directly related to recoverable reserves, whereas **capacity** is determined by the contract requirements of residue gas purchasers, seasonal swing, the nature of the product to be extracted and the depth of extraction, as well as the amount of gas economically available. (R. 703, 708-709, 1317-1319)

(R. 1398-1400). Both DeLaat and Edwards at the January 16 meeting were computing sustained *throughput* as distinguished from *capacity* and determined that the plant would not support a sustained *throughput* of 40,000 mcfd. This distorted Martin's obligations. Bank has judicially admitted this fact in its original answer. DeLaat, supported by Edwards of Phillips, determined on January 16th a 33,000 mcfd *throughput* was feasible. Applying the industry accepted rule of thumb *throughput* is generally considered 80% of capacity, so a 33,000 mcfd *throughput* would normally require a plant of 40,000 mcfd *capacity*. (R. 492, 584, 1052; Edwards Dep. 294, 303-304)

James Anderson of Jett had reached almost the same results in 1960 with respect to *throughput* that DeLaat and Edwards of Phillips reached in 1961, and it was Anderson who supplied the 40,000 mcfd *capacity* figures to Jett. (R. 758-759, 707-708.)

The best evidence of the adequacy of the reserves is the fact that Bank did finance 100% of the acquisition on the same reserves and for a smaller residual interest than it would have had with Martin. (R. 1527, 1529, 1560, 1561-1562.)

3. *The Court of Appeals was in error because Bank's financing Martin was not conditioned (i) on a reserve report by DeLaat supporting a throughput of 40,000 mcfd, or (ii) on Jett's agreement to subordinate his interest.*

No one has yet testified that Bank's financing Martin was conditioned on a reserve report by DeLaat that would support a sustained *throughput* of 40,000 mcfd, or on Jett's interest being subordinated.

Bank simply engaged DeLaat to check the reserve figures of Ogier, and nothing was said about an independent reserve

determination by DeLaat as being a condition to Bank's financing. (R. 1165-1166.)

Subordination by Jett had not been made a condition by January 16th.[19] Subordination of Jett's interest to loan pay-out was passingly discussed with Jett in early January, 1961, but was never a condition of Bank's financing Martin (R. 1163-1164, 1175-1178.) Had Jett been pressed to subordinate there is every indication he would have agreed because his primary interest in the Locust Ridge transaction was to obtain a market for his undedicated shut-in gas. Jett also had 30,000 undeveloped acres in the Locust Ridge area and a gas market was essential to deveolping these reserves. (R. 759, 874-877, 1510-1511, 1514.)

When Bank and Phillips agreed on January 13 that Phillips was (i) to operate the plant for a fee, (ii) receive brokerage on the LPG's and (iii) have a 50% interest after pay-out, the problem then arose as to how to get Phillips 50% of the deal. (R. 951-952, 1269-1273.)

Clearly Phillips, Martin and Bank, or its nominee Texas San Juan, could not each own 50% and Jett have 12-1/2%.

After Bank and Phillips agreed it then became a problem of whose interest to reduce, because Bank on Friday the 13th told Martin Phillips' entry made everybody take less—including Bank, or its nominee Texas San Juan. By eliminating Martin, Bank and Phillips had only Jett with whom to deal. (R. 1189, 1433, 1440-1441.)

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[19] On the Sunday flight to Houston, January 15, McCullough told the Phillips team that the breakdown of interest in the Locust Ridge acquisition was: Robert Martin and associate 43.75%; Bank 43.75% and Jett 12.5%, figures obviously obtained by McCullough from Bailey on January 13. Nothing was said about subordination of Jett's 12.5% interest being a condition of Bank's financing Martin. (R. 1058, 1498).

4. The Court of Appeals was in error because Bank had no right to give Martin's deal to Phillips.

There is simply no conceivable theory which would justify Bank's surreptitious connivance with Phillips to exclude Martin and take over Martin's deal. The option was Martin's from Jett and was never assigned or contracted away to Bank. The reason given by the Court of Appeals for Bank contacting Phillips was that Bank was seeking an operator, reserves and a market (Appendix A, p. 5), which assumed reason, in addition to being contrary to the District Court's holding that Bank contacted Phillips to cultivate an old and cherished customer, assumed that Bank had a right over Martin's deal which Bank in fact did not have. (Appendix B, p. 5)

5. The Court of Appeals was in error because Martin was able to operate the plant.

Operating a gas processing plant does not require any degree of expertise by the person in charge of such operations because of the availability of competent personnel and consultants to take care of the technical features of the operations. Martin contemplated the use of such personnel and consultants, including Gasoline Plant, of whom Bank and Phillips thought very highly. (R. 702-705, 1264, 1428-1430.)

6. The Court of Appeals was in error because Martin had the ability to finance the acquisition.

The essence of the Bank-Martin deal was that Martin would exchange a 50% net interest in his optioned property for 100% financing by Bank. Thus, Martin had the

identical ability to finance that was eventually used in the acquisition and expansion.[20]

Using minimum valuations determined by Phillips in March, 1961, 100% of the properties covered by the Martin-Jett option would produce minimum net revenues after loan pay-out during the next 15 years of $2,553,-000.00. Martin agreed to convey to Bank, or its nominee Texas San Juan, a 43.5% interest which would produce minimum net revenues after loan pay-out of $1,110,555.00 during such 15 years. Under the agreement with Bank and Phillips, however, Bank financed 100% of the total acquisition and expansion for a net 24.5% interest which would produce only $625,485.00 in minimum net revenues after loan pay-out during such 15 years. (R. 1510-1514, 1560.)

7. The Court of Appeals was in error because if Martin was a "mere finder" he nonetheless had "business or property."

The Court of Appeals labeled Martin as a "finder" and held his status as a "finder" would not entitle him to maintain a private civil action for violation of the antitrust laws. (Appendix A, p. 11) There is nothing in the antitrust laws nor their case history which says that a "finder," if such Martin was, would have no "property" and therefore no standing to sue under the Clayton Act, Section 4.

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[20] In response to the question of what Martin contributed to the deal he replied, "First of all, I had the option on the deal. Secondly, we made numerous investigations and had some studies prepared. Third, we were requested by Mr. Bailey to enter in with them on the furtherance of this deal on the basis that the bank would finance it 100 per cent if we would agree that they could use the income for the purpose of recouping a tax loss, and his offer to advance a hundred per cent would be in lieu of any equity on their part by virtue of them being able to recoup the tax loss." (R. 1221)

8. The Court of Appeals was in error because Martin's recognized option was valid.

The law of Louisiana was not judicially noticed in the Southern District of Texas and clearly presents an issue of fact of foreign law. It is the settled policy of Louisiana courts to enforce contracts otherwise subject to Article 2440 of the Louisiana Civil Code if the parties to such contract interpose no objection. *Strawbridge v. Warfield,* 4 La. 20 (1832); *Packwood v. White,* 7 La. Ann. 31 (New Orleans 1852); *Pauline v. Hubert,* 14 La. Ann. 161 (New Orleans 1859). It is thus apparent that under Louisiana law Martin's exclusive option was "property" since both Martin and Jett honored it without equivocation through its oral extension. A contract thus valid, binding, and enforceable when so honored by the parties would clearly be property under the decisions of the Fifth Circuit. See *North Texas Producers' Association v. Young,* 308 F.2d 235 (C.A. 5, 1962), cert. den. 372 U.S. 929 (1963), and *Vines v. General Outdoor Advertising Company,* 171 F.2d 487 (C.A. 2, 1948).

The Court of Appeals in order to hold that Martin had no "business or property" made material the foregoing facts which it assumed. Each of these facts is erroneous or controverted in some degree by the parties. Therefore, each of the material controverted facts assumed by the Court of Appeals violates the cases of *Poller v. Columbia Broadcasting Co., Inc.,* 368 U.S. 464 (1962) and *United States v. Continental Oil Co.,* 377 U.S. 161 (1964), since a Court of Appeals has no more right to assume such facts on an appeal from a summary judgment than does a district court in granting such a summary judgment.

II.

This Court has never written on the meaning of the phrase "business or property" contained in Section 4 of the Clayton Act (15 U.S.C., Section 15), and such action is important to the private administration of the antitrust laws.

The Attorney General of the United States can give attention only to major violations of the antitrust laws.[21] This of necessity leaves many gaps in the administration of such laws. This Court has recognized the belief of Congress that "private antitrust litigation is one of the surest weapons for effective enforcement of the antitrust laws." *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 318 (1965). See also *Radovich v. National Football League*, 352 U.S. 445, 454 (1957); *Lawlor v. National Screen Service Corporation*, 349 U.S. 322, 329 (1954); *Keifer-Stewart Co. v. Joseph Seagram and Sons, Inc.*, 340 U.S. 211 (1950).

At the heart of private enforcement is the question of what is "business or property" within the meaning of Section 4 of the Clayton Act. The importance of removing all obstacles consistent with due process is emphasized by the fact that in the majority of these treble damage actions involving smaller transactions, the plaintiff does not have the benefit of prior government action and

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[21] "There were 521 antitrust cases commenced in the district courts during 1965, or 75 more than were filed in 1964. This rise was due to a marked increase in private cases (exclusive of electrical equipment industry antitrust suits) filed, 443 in 1965 compared to 317 in 1964. The number of civil and criminal antitrust cases commenced by the Government decreased to the lowest number in the last 8 years." 1965 **Administrative Office of the United States Courts Director's Ann. Rep.** 119.

investigation as provided by Section 5 of the Clayton Act (15 U.S.C. Section 16).

This Court, however, notwithstanding the importance of the question, has not discussed the "business or property" concept. The need for clarification is strongly suggested by the Court of Appeals' opinion in this case in which the Court was somewhat mechanical in its analysis and in which strong emphasis was placed on state law—law fashioned for purposes unrelated to the antitrust laws. (Appendix A, p. 11)

The absence of a discussion of and holding on this important aspect of this major federal law is sufficient basis for granting the writ. *Continental Ore Co. v. Union Carbide and Carbon Corp., et al.*, 370 U.S. 690, 696 (1962); *Pittsburgh Plate Glass Co. v. United States*, 360 U.S. 395, 397 (1959); *Indian Towing Co. v. United States*, 350 U.S. 61, 63 (1955).

III.

The decision in this case of the Court of Appeals for the Fifth Circuit on "business or property" is in conflict with decisions of other Courts of Appeals.

The decision of the Fifth Circuit in this case is in conflict with that of the Ninth Circuit in *Jerrold Electronics Corporation v. Wescoast Broadcasting Company*, 341 F.2d 653 (C.A. 9, 1965), cert. den. 382 U.S. 817 (1965); with that of *Vines v. General Outdoor Advertising Company*, 171 F.2d 487 (C.A. 2, 1948); and with that of another panel of the Fifth Circuit in *North Texas Producers' Association v. Young*, 308 F.2d 235 (C.A. 5, 1962); cert. den. 372 U.S. 929 (1963).

The Fifth Circuit held in this case that Martin had no "business or property" that could be affected by respondents', combination or conspiracy, notwithstanding:

That Martin was in the oil and gas business; that he had incurred expenses toward the Locust Ridge acquisition of some $10,000.00 prior to the wrongful acts of respondents; that he obtained a written option on the Locust Ridge properties, later extended orally with Bank's assistance, to include the period in which such wrongful acts occurred; that Jett steadfastly adhered to the oral option though McCullough invited him to disregard it on the morning of January 16 and come to Houston to participate in direct negotiations with Phillips and Bank; that it is the settled policy of Louisiana courts to enforce contracts, otherwise unenforceable under Article 2440 of the Louisiana Civil Code, if the parties to such contracts interpose no objection. *Strawbridge v. Warfield*, 4 La. 20 (1832); *Packwood v. White*, 7 La. Ann. 31 (New Orleans 1852); *Pauline v. Hubert*, 14 La. Ann. 161 (New Orleans 1859)[22] that Martin's negotiations with Bank had reached such stage as early as December 18, 1960, that Bailey was writing to Martin with respect to "our joint enterprises"; that Bailey was reporting to all concerned during the week of January 9, while this oral extension was in effect, that the negotiations were progressing satisfactorily and that he saw no reason why the acquisition should not be consummated; that such conditions as there were in Martin's option, Jett indicated could have been worked out and met in the light of new facts, and that Hudson, president of Texas San

[22] These cases were cited to the Fifth Circuit, but they, and the point for which they stand, were apparently not considered in reaching the decision of the Court.

Juan, stated to the Phillips-Bank meeting on January 16, that Martin was more than a "finder".

In *Wescoast*, supra, the facts, in comparison to the above, disclosed—that plaintiff had not started its business at the time of the antitrust violation of defendants, having only an order pending for equipment which was never shipped (341 F.2d at pages 656, 657); that it was not prepared to fully finance its projected business enterprise, it having ultimately failed for lack of financing (Id. at 660); that in the face of the violation of defendants, plaintiff therein "voluntarily" abandoned its order for equipment (Id. at 658) "voluntarily" abandoned its business, and "voluntarily" sold out to its tormentors (Id. at 661). Nevertheless, plaintiff in Wescoast prevailed in a treble damage action which necessarily involved the holding that it had "business or property" at the time of the defendant's wrongs.[23]

There was more substance in Martin's business status, contracts and other relationships than there was in those of Wescoast.

In *North Texas*, supra, plaintiff Young had a contract which the Court assumed he could not fulfill because of defendant's conduct (308 F.2d at 245) Nevertheless the Court held that the plaintiff had business and property (Id. at 242-243, 245) This contrasts with the holding of the Court in the instant case that Martin's option was not property, though both parties to it steadfastly adhered to its obligations.

The holding in the instant case is in conflict with the holding of the Second Circuit in *Vines*,[24] supra. There

[23] **Wescoast** was cited to, but overlooked by, the Fifth Circuit.

[24] **Vines** was also cited to, but not discussed by, the Fifth Circuit.

Vines had no contract of any character with defendant or anyone else. He had only a reasonable expectation of continued dealings with defendant. (171 F.2d at 491) The Court in 171 F.2d at 491, said persons could have property:

> ". . . though they have no contract with the wrongdoer, but only an expectation of future dealings with him . . . The absence of any contract obligation gave the defendant no more immunity from that tort than from any other tort."

These conflicts warrant issuance of the writ. *Minnesota Mining and Manufacturing Co. v. New Jersey Wood Finishing Co.*, 381 U.S. 311, 314 (1965); *Waterman Steamship Corp. v. United States*, 381 U.S. 252, 258 (1965); *United States v. Muniz*, 374 U.S. 150, 151 (1963); *Knetsch v. United States*, 364 U.S. 361, 362 (1960); *Federal Power Commission v. Tuscarora Indian Nation*, 362 U.S. 99, 110 (1960).

IV.

The holding of the Court of Appeals erroneously affirming the summary judgment of the District Court which held that the actions of the respondents were not violations of the antitrust laws and in failing to hold that such actions did, as a matter of law, constitute such violations, is in conflict with the decisions of this Court and other Courts of Appeals.

A. The holding is in conflict with decisions holding such actions constitute unlawful exclusion of a competitor from substantial participation in a market in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

The record establishes that substantial interstate commerce is involved; that respondents combined to foreclose Martin from the relevant market and give marketing control of the Locust Ridge products to Phillips, an already substantial competitor in such market. The holding of the Court of Appeals affirming the holding of the trial court that such combined exclusionary action of respondents was not a violation of Section 1 of the Sherman Act, and in failing to hold, that such conduct constituted such violation, is in conflict with the decisions of this Court in *United States v. General Motors Corp., et al.*, ____ U.S. ____ 86 S.Ct. 1321 (1966); *United States v. First National Bank and Trust Co. of Lexington*, 376 U.S. 665 (1964); *United States v. Parke, Davis & Co.*, 362 U.S. 29 (1960); *International Salt Co. v. United States*, 332 U.S. 392 (1947); *Associated Press v. United States*, 326 U.S. 1 (1945); *Northern Securities Co. v. United States*, 193 U.S. 197 (1904); and with the following decisions of other Courts of Appeals: *Girardi v. Gates Rubber Company Sales Div., Inc.*, 325 F.2d 196 (C.A. 9, 1963); *Walker Distributing Co. v. Lucky Lager Brewing Co.*, 323 F.2d 1 (C.A. 9, 1963); *Gamco, Inc. v. Providence Fruit & Produce Bldg.*, 194 F.2d 484 (C.A. 1, 1952), cert. den. 344 U.S. 817 (1952); *American Federation of Tobacco Growers v. Neal*, 183 F.2d 869 (C.A. 4, 1950); *Paramount Pictures, Inc. v. United Motion Picture Theater Owners of Eastern Pennsylvania, Southern New Jersey and Delaware*, 93 F.2d 714 (C.A. 3, 1937).

In *International Salt* this Court said in 332 U.S. at Page 396 that it is ". . . unreasonable, per se, to foreclose competitors from any substantial market."

In *Lexington* this Court said of *Northern Securities* at 376 U.S. 670:

"A violation of Section 1 was adjudged without reference to or a determination of the extent to which the traffic of the combined roads was still subject to some competition. It was enough that the two roads competed, that their competition was not insubstantial, and that the combination put an end to it."

B. The holding is in conflict with decisions holding such actions constitute a boycott in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

It is undisputed in the record:

That under the arrangement contemplated by Martin, Bank and Texas San Juan, Martin was to have, subject to Jett's interest, a 50% net profits interest after payout of the acquisition and expansion loans and was to be the operator of the plant and the marketer of its products; that without Martin's knowledge and consent Bank, on January 12, 1961, contacted Phillips with respect to Martin's deal, in which contact Bank and Phillips agreed, without even a proviso that it would be subject to Martin's approval, that Phillips would become the 50% net profits owner, be the operator of the plant and the marketer of its products; that when Martin objected, a Phillips team of high-ranking officials and staff members came to Houston, and on the day Martin's exclusive option was to expire, went into closed session with Bank officials and consultants employed by Martin, neither notifying Martin of the time and place of the meeting, nor inviting him to it; downgraded Martin to the role of a "finder" at best; and at the end of the day advised him his deal would not go and offered him a reduced participation in a revised deal, Phillips to occupy the position formerly contemplated for Martin.

The holding of the Court of Appeals affirming the holding of the district court that such actions did not constitute a boycott of Martin in violation of Section 1 of the Sherman Act, 15 U.S.C. Section 1, and in failing to hold that such conduct did, as a matter of law, constitute such violation, is in conflict with the following holdings of this Court and of other federal courts. *Silver v. New York Stock Exchange*, 373 U.S. 341 (1963); *Radiant Burners, Inc. v. Peoples Gas Light & Coke Co.*, 364 U.S. 656 (1961); *Klor's, Inc. v. Broadway-Hale Stores, Inc., et al.*, 359 U.S. 207 (1959); *Associated Press v. United States*, 326 U.S. 1 (1945); *Fashion Originators' Guild of America v. Federal Trade Commission*, 312 U.S. 457 (1941); *Jones Knitting Corp. v. Morgan*, 361 F.2d 451 (C.A. 3, 1966); *Washington State Bowling Proprietors Association, Inc. v. Pacific Lanes, Inc.*, 356 F.2d 371 (C.A. 9, 1966), cert. den. ____U.S.____, 86 S.Ct. 1590 (1966); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Products Co.*, 284 F.2d 1 (C.A. 9, 1960) [Rev. 370 U.S. 19 (1962), because the entities charged with combination were, in legal contemplation, one and could not combine].

The fact that the plan of respondents did not oust Martin completely, but would have left him with half a loaf, does not excuse the violation. *Silver v. New York Stock Exchange*, supra; *Klor's, Inc. v. Broadway-Hale Stores, Inc., et al.*, supra; *Fashion Originators' Guild of America v. Federal Trade Commission*, supra. This Court in *Silver* put that point to rest in a footnote in 373 U.S. at Page 348 when it stated:

> "Nor does any excuse derive from the fact that the collective refusal to deal was only with reference to the private wires, the member firms remaining willing to deal with petitioners for the purchase and sale of securities (citing authorities) . . . That is enough to create a violation of the Sherman Act."

C. The holding is in conflict with decisions holding actions such as those of Bank in tying to the availability of its credit in Martin's behalf that he accept Phillips as dominant interest owner-operator of the plant and marketer of its products constitute unlawful tying arrangements in violation of Section 1 of the Sherman Act (15 U.S.C., Section 1).

It is undisputed on the record that Bank had, on January 13, 1961, almost 100% monopoly power over the credit for financing the acquisition of the Locust Ridge properties. Its controlled corporation had a tax loss carry forward in excess of $2,000,000.00 The record is affirmatively to the effect, and without dissent, that this tax loss carry forward was in fact the key to the acquisition of the Locust Ridge properties. (R. 569-570, 637-638, 1252-1254, 1313-1314, 1358) Furthermore, on January 13, 1961, when Bank and Phillips made their agreement, Martin's exclusive option had approximately 3½ days to run, two of which were a Saturday and a Sunday. That was an incredibly short time for Martin to acquire other financing of this magnitude, even if the tax loss had not been the key. It is also undisputed on the record that Bank contacted Martin and tied to the extension of its credit the services of Phillips as operator of the plant and marketer of its products. The holding of the Court of Appeals affirming the decision of the trial court that, as a matter of law, such tying by Bank was not a violation of Section 1 of the Sherman Act (15 U.S.C., Section 1), and in failing to hold that, as a matter of law, such tying activities of Bank did constitute such violation of such section, is in conflict with the holdings of this court and of other Courts of Appeals. *United States v. Loew's, Inc., et al.*,

371 U.S. 38 (1962); *Northern Pacific Railway Co. v. United States*, 356 U.S. 1 (1958); *International Salt Co. v. United States*, 332 392 (1947); *Jerrold Electronics Corporation v. Wescoast Broadcasting Company*, 341 F.2d 653 (C.A. 9, 1965); cert. den. 382 U.S. 817 (1965); *Osborn v. Sinclair Refining Co.*, 286 F.2d 832 (C.A. 4, 1960); second appeal, 324 F.2d 566, (C.A. 4, 1963); *United States v. Jerrold Electronics Corp.*, 187 F.Supp. 545 (E.D. Pa. 1960), aff'd per curiam 365 U.S. 567 (1961).

The fact that Bank did not control or have a monopoly of the lending of money generally is beside the point. What was involved was the financing by Bank of the acquisition and expansion of the Locust Ridge properties under the facts and circumstances of this case as they existed between January 13 and January 16, 1961. In *Northern Pacific*, supra, this Court said of tying arrangements at 356 U.S. 6:

> "They are unreasonable in and of themselves whenever a party has sufficient economic power with respect to the tying product to appreciably restrain free competition in the market for the tied product and a 'not insubstantial' amount of interstate commerce is affected."

In the instant case Bank had the requisite monopoly power and the commerce involved was substantial.

D. The decision is in conflict with decisions holding that predatory combinations and conspiracies such as that between Bank and Phillips, the leading producer nationally of LPG products and a substantial seller in an oligopolistic relevant market, constitute attempts or conspiracies to monopolize in violation of Section 2 of the Sherman Act (15 U.S.C., Section 2).

The trial court found that Bank, in bad faith with Martin, combined its tremendous economic advantages with those of Phillips to eliminate Martin from participation as a competitor in the Locust Ridge relevant market in an attempt to create a monopoly, Bank being prompted so to do by its desire to increase in favor "with an old and cherished customer, and with an eye to increased future business . . ." (R. 953-954; Appendix B, p. 5). The trial court nevertheless concluded, which holding was affirmed by the Court of Appeals, that such conduct did not constitute an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C. Section 2. (R. 955-956; Appendix B, pp. 7-8). Such decision is in conflict with the decision of this Court in *Standard Oil Co. of New Jersey v. United States*, 221 U.S. 1, 61 (1911), and with that of the Ninth Circuit in *Lessig v. Tidewater Oil Company*, 327 F.2d 459, 474-475 (1964), cert. den. 377 U.S. 993 (1964), and with that of the Eighth Circuit in *National Wrestling Alliance v. Myers*, 325 F.2d 768 (1963).

In Tidewater the oil company was charged with tying TBA items to the lease of its station and the sale of its products in an attempt to monopolize in violation of Section 2. The Court of Appeals held that probability of actual realization is not an essential element in an attempt case where there is intent; that relevant market was not an issue in an attempt or conspiracy to monopolize case, and that Section 2 prohibits "attempts to monopolize 'any part' of commerce and a dominant position in the business of distributing petroleum products and TBA was not necessarily prerequisite to ability to attempt to monopolize an appreciable segment of interstate sales in such products." (327 F.2d at 474-475)

In *Wrestling Alliance,* the Court said that monopoly power in an attempt to monopolize case was a consequence of a combination or agreement. (325 F.2d at 774)

E. The decision is in conflict with other decisions holding that actions such as that of Phillips, a substantial existing competitor in the already oligopolistic Locust Ridge relevant market, in acquiring the assets of the competitive Locust Ridge corporations, constitute a violation of Section 7 of the Clayton Act (15 U.S.C., Section 18).

The decision of the trial court, affirmed by the Court of Appeals, acknowledged that Phillips had acquired assets of Locust Ridge corporations (R. 959; Appendix B, pp. 10-11). This is consistent with the holding of the court in *United States v. Columbia Pictures Corporation,* 189 F.Supp. 153 (S.D.N.Y. 1960), which appears to be the only decision of any court on doubtful facts on the meaning of "assets" as used in Section 7. It is submitted that it is important to the administration of Section 7 of the Clayton Act that this Court speak on the meaning of "assets" in the context of the facts presented in this case.

The record further discloses that the Locust Ridge relevant market for LPG products was oligopolistic before Phillips acquired the assets in question and became decidedly more so by such acquisition and by a subsequent affiliation of two other competitors in such market.

The holding of the Court of Appeals affirming the decision of the trial court that such acquisition of assets did not constitute a violation of Section 7 of the Clayton Act and in failing to hold that said acquisition did constitute such violation is in conflict with the following holdings of this Court: *United States v. Pabst Brewing Co., et al,*

____U.S.____, 86 Sup.Ct. 1665 (1966); *United States v. Von's Grocery Co.*, ____U.S.____, 86 Sup.Ct. 1478 (1966); *United States v. Continental Can Co.*, 378 U.S. 441 (1964); *United States v. Penn-Olin Chemical Co.*, 378 U.S. 158 (1964); *United States v. Aluminum Co. of America*, 377 U.S. 271 (1964); *United States v. El Paso Natural Gas Co.*, 376 U.S. 651 (1964); *Brown Shoe Co. v. United States*, 370 U.S. 294 (1962).

The degree of concentration in the relevant market in most of the above cases was not as great as that in the instant case and in this case we have the additional factor that the acquisition was made by combination.

V.

The denial of discovery as affirmed by the Court of Appeals is contrary to the decisions of this Court and other Courts.

The trial court, in sustaining objections of the respondents, refused to require officers of Phillips (R. 207, Item III; R. 209, Items VI, 1 and 2; R. 306, Item (1); R. 537-538, Items 1, 2, 3 and 5; R. 557) and Bank (R. 257, 263-265, Items (1)-(30); 394-395) to produce documents, notes and memoranda made by them containing reports on, or records of, the essence of the critical conferences held between and among them between January 12 and January 16, 1961, and immediately thereafter. The trial court completely ignored the distinction between the worth of written records made at the time of the events by parties free of the brainwashing effects of litigation, as compared to the oral testimony of witnesses given years thereafter, when their minds and memories have been conditioned by the incessant pressures of self-interest. The

ruling of the Court of Appeals which affirmed the decision and rulings of the trial court on these issues of discovery is in conflict with the decision of this Court in *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), in which this Court said, at Pages 114-115:

> ". . . with the basic premise 'that the deposition-discovery rules are to be accorded a broad and liberal treatment,' *Hickman v. Taylor*, 329 U.S. supra, at 507 . . . to effectuate their purpose that 'civil trials in the federal courts no longer need be carried on in the dark'."

Such holdings of the trial court are also in conflict with the following decisions of other federal courts: *United Airlines, Inc. v. United States*, 186 F.Supp. 824 (D.C.D. Del. 1960); *Brauner v. United States*, 10 F.R.D. 468 (E.D. Pa. 1950).

CONCLUSION

The importance of the issues involved in this case seems apparent, as does the need for an express treatment by this Court of the issues under Sections 1 and 2 of the Sherman Act and Sections 4 and 7 of the Clayton Act as applied to the facts of this case. It is submitted that it has been demonstrated that the holding of the Court of Appeals on the issues of "business or property" is in conflict with decisions of other Courts of Appeal. It is also submitted that the holdings of the district court affirmed by the Court of Appeals are in direct conflict with holdings of this Court and of other Courts of Appeal on like issues in other cases.

WHEREFORE, and for the reasons stated, a writ of certiorari to the United States Court of Appeals for the Fifth Circuit should be granted.

Respectfully submitted,

A. A. WHITE
BEN H. SCHLEIDER, JR.
EARL O. LATIMER II

By _____
Ben H. Schleider, Jr.

Attorney for Petitioner,
ROBERT H. MARTIN

CERTIFICATE OF SERVICE

I, BEN H. SCHLEIDER, JR., one of the attorneys for petitioner, and a member of the bar of the Supreme Court of the United States, hereby certify that copies of this petition have been served on counsel for respondents, by mail, in accordance with Rule 33 of the Supreme Court Rules, on this_____ day of October, 1966.

_____
Ben H. Schleider, Jr.
Attorney for Petitioner

APPENDIX A

IN THE

United States Court of Appeals

FOR THE FIFTH CIRCUIT

NO. 22,493

ROBERT H. MARTIN, *Appellant*,

versus

PHILLIPS PETROLEUM COMPANY, ET AL.,
Appellees

Appeal from the United States District Court for the Southern District of Texas.

(July 26, 1966.)

Before BELL and THORNBERRY, Circuit Judges and FISHER, District Judge.

BELL, Circuit Judge: This appeal involves a suit for treble damages brought under § 4 of the Clayton Act. 15 USCA, § 15. The suit is premised on alleged violations of §§ 1 and 2 of the Sherman Act, 15 USCA, §§ 1, 2; and §§ 3 and 7 of the Clayton Act, 15 USCA, §§ 14 and 18. Summary judgment was entered in the District Court for the defendants.[1]

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[1] The principal defendants are Phillips Petroleum Company and the Chemical Bank New York Trust Company. The other defendants are corporations and individuals who participated in the transaction which forms the subject matter of the suit to the extent described.

Robert Martin, the plaintiff-appellant, charged that the defendants-appellees combined and conspired to restrain and monopolize interstate commerce in violation of the Sherman Act by taking over and replacing him in the acquisition of a gasoline plant (Locust Ridge), and related properties. He also charged that the acquisition of the stock and assets of corporations owning the Locust Ridge properties resulted in a substantial lessening of competition in violation of § 7 of the Clayton Act. The § 3 of the Clayton Act charge is not pursued on this appeal. He asserted that the displacement injured him in his business and property.

We reach only the first issue: Was Martin injured in his business or property within the scope of § 4 of the Clayton Act? Being of the view that he was not, we affirm.

I.

In the fall of 1960, defendant George H. Jett, a Shreveport oil and gas operator, obtained an option to purchase the Locust Ridge gasoline plant, its gas purchasing and processing contracts, and gathering facilities for $1,800,000. His hope was to find a buyer for the plant.[2]

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[2] The Locust Ridge gasoline plant is located in Tensas Parish, Louisiana, near the Mississippi River, and processes natural gas gathered by a pipeline system from fields in northeastern Louisiana and northwestern Mississippi. The plant was put in operation in 1958 by its owners, the Feazel-Wheless group, with Tensas Gas Gathering Corporation, a defendant, owning the gas gathering pipeline system and the actual plant operations being conducted

One prospect for the properties was Martin, an independent oil and gas operator who had been engaged in exploring for, producing, transporting, and marketing oil and gas, and doing first stage processing of gas. While on business in New York in November, 1960, Martin inquired of Bailey, an officer of appellee Bank, whether the Bank would be interested in financing the purchase if Martin could work things out with Jett. At that time Bank controlled defendant Texas San Juan, a corporation engaged in other phases of the oil and gas business. Texas San Juan had a substantial federal income tax loss carry-forward and was indebted to the Bank. Recognizing the possibility of using Texas San Juan as a vehicle for acquiring the Locust Ridge properties, thereby utilizing the tax loss, and perhaps collecting its debt, Bank expressed immediate interest.

Martin then obtained an exclusive sub-option from Jett on December 29, 1960. Under its terms Martin was offered the plant and related properties for $2,000,000, provided that he would expand the plant capacity sufficiently to accommodate Jett's shut-in gas. Jett was also to have an one-eighth net profits interest. The sub-option would expire January 10, 1961. It was later orally extended to January 16, and then to January 25.

Meanwhile, Martin continued his negotiations with the Bank. It was contemplated that the loan would be made

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by Gas Industries Management Corporation, also a defendant. The plant processed wet gas, sold the natural gas and LPG products extracted therefrom in northeastern Louisiana and northwestern Mississippi and disposed of the dry gas outside the area.

to Texas San Juan, and title to the properties would be taken in its name. After payout of the loans, Martin and Texas San Juan would each have a 50% interest in the venture, and Martin would operate the plant. Martin was to provide the Bank with tests and surveys of the plant and its reserves. A condition precedent to any financing was a favorable report by De Laat, also a defendant, as to the sufficiency of the reserves to support the expansion of the plant required under the sub-option. This condition was necessary to meet the terms of the sub-option which required an expansion of the plant from a processing capacity of 25,000 Mcf of gas per day to 40,000 Mcf per day. The Bank demurred to the one-eighth override which Jett was to receive, and told Martin that Jett would have to defer receiving any income until the proposed loans were paid. The De Laat report disclosed insufficient reserves. No subordination agreement was ever obtained from Jett, although he submitted an affidavit in which he stated that he would not have insisted on the expansion if the reserves, as it turned out, would not have warranted the expansion. His purpose was to insure the sale of his shut-in gas.

During the week of January 9, 1961, Bailey and Martin had several telephone conferences. The substance of these was that Bailey felt the negotiations were progressing satisfactorily. Bailey indicated to Jett at about this time that the Bank would determine whether it would make the loan on January 16; and if so, the Bank would pay Jett earnest money of $200,000 on that date.

On January 12, 1961, Bailey contacted an officer of Phillips to discuss the Locust Ridge properties. Phillips had a substantial deposit and a cordial business relation-

ship with the Bank. Phillips expressed interest,[3] but insisted that business be done on its terms: that Phillips would operate the plant; receive a 50% interest in the facilities after pay-out of the loans; and receive brokerage fees for the sale of its products. The Bank was seeking an experienced plant operator, gas reserves, and a product market. All three were available in Phillips. The parties agreed to pursue the matter further at a meeting to be held on January 16. Bailey then called Martin to tell him of Phillips' interest and of the January 16 meeting. Martin protested Phillips being brought into the deal, and commenced a search for financing elsewhere the next day. Neither Martin nor his representative were invited or in attendance at the morning meeting which consisted of representatives of Phillips, the Bank, De Laat, and others. At this meeting, materials furnished by Martin to the Bank were made available to Phillips. Martin was brought into the meeting that afternoon and was informed that his original proposal was not acceptable to the Bank. He was offered participation in a revised deal submitted by Phillips, whereby he would have received a three-sixteenths overall interest. Martin rejected this counterproposal; withdrew his loan application; and proceeded in

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[3] Phillips, having considered building such a plant in 1957, had attempted to acquire an interest in the plant while it was being built. After the plant was built, Phillips sought to purchase its liquids, but the owners refused to sell Phillips an interest in either the plant or its liquids. However, in early 1960, they offered the plant to Phillips for $2,000,000. Phillips concluded that the plant was overpriced and refused the offer. The interest of Phillips in the Locust Ridge properties was due to the plant's strategic location which afforded Phillips an opportunity to market its products in areas which it could not otherwise economically serve.

his efforts to obtain financing elsewhere. Unable to obtain such financing, his sub-option expired unexercised on January 25, 1961.[4]

II.

In a treble damage suit brought under the federal anti-trust laws, plaintiff must allege and prove that he has seen "injured in his business or property" by acts of the defendant proscribed by § 4 of the Clayton Act, 15 USCA, § 15.[5] Martin admitted that he had never been engaged in either the ownership or operation of a gasoline plant or in marketing the products thereof. He stated that he had engaged in the leasing, exploration, drilling, gas processing, as well as the operation and management of producing oil and gas properties and the sale and marketing of products therefrom. He had also engaged in the gathering and transporting of natural gas. Recognizing this fact, appellees argue that there must be injury to an actual going business; that it is improper to consider the oil and gas business generally as a single business for purposes of the antitrust laws; that the management of producing properties is a business separate and distinct from the operation of a gas plant; hence, since appellant had never engaged in the business of operating a gas plant, he had no business which appellees could injure, but only an expectancy or hope of entering a new business.

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[4] The sub-option to Martin was not exclusive from January 16 to January 25.

[5] "Any person who shall be injured in his business or property by reason of anything forbidden in the antitrust laws may sue therefor . . . and shall recover threefold the damages by him sustained, . . ."

In support of this position they cite *La Rouche v. United Shoe Machinery Corporation*, D. Mass., 1958, 166 F.Supp. 633, where the court held that research in shoe manufacturing and machinery was not the same business as the manufacture of shoe machinery, although both were part of the shoe industry. They also rely on the case of *Brownlee v. Malco Theatres, Inc.*, W.D.Ark., 1951, 99 F.Supp. 312, in which the court refused to hold that a former theater manager who was attempting to buy a theater, but who did not own one, was in the motion picture business, even though he had formerly been in the business and had some experience in it. The case turned on the fact that he had only a hope; he did not complete his negotiations for the purchase of the theater and it was sold to another.

On the other hand, Martin maintains that the oil and gas industry is a single business for the purpose of § 4 of the Clayton Act; that he was in business in that industry; that the right to expand was an integral part of his business; and that he was injured in his business when he was prevented from expanding through the purchase of the gasoline plant. His thesis apparently is that the expansion was prevented by the combined activity of Phillips and the Bank; Phillips by taking his place in the proposed purchase, and the Bank by making this possible through its refusal to finance him.

The court will pursue a somewhat different line of reasoning in disposing of these arguments. Martin may establish the requisite injury under § 4 by showing injury to business or property, and we will examine the business aspect first.

There are numerous decisions stating that one need not have an actual going business to obtain standing, but an attempt to enter a business is sufficient. *Triangle Conduit & Cable Co., Inc. v. National Electric Products Corporation*, 3 Cir., 1945, 152 F.2d 398; *American Banana Co. v. United Fruit Co.*, 2 Cir., 1908, 166 F.2d 261; *Waldron v. British Petroleum Co., Ltd.*, S.D.N.Y., 1964, 231 F. Supp. 72; *Delaware Valley Marine Supply Company v. American Tobacco Company*, E.D. Penn., 1960, 184 F. Supp. 440. However, these decisions lay down two significant requirements. First, there must be the intention to enter the business; and second, there must be a showing of preparedness to enter the business. This is the rule in this circuit. See *North Texas Producers Association v. Young*, 5 Cir., 1962, 308 F.2d 235, *cert. den.*, 372 U.S. 929, 83 S.Ct. 874, 9 L.Ed.2d 733, where the court stated the rule, and that the plaintiff there met the business requirement. However, the precise holding is based on a finding of injury to property, a contract, rather than injury to a business.

Here we deal with the contention that a business expansion was envisioned, and we hold that the same rule applies. There must be a showing of intent to expand and of preparedness for the expansion. Mr. Martin manifested the required intent by obtaining the sub-option from Jett and entering into negotiations with the Bank. However, there was a complete failure to demonstrate the necessary "preparedness" for acquisition of the Locust Ridge properties. In *Waldron v. British Petroleum Co., Ltd., supra*, it was stated:

> "The legal content of 'business or property,' for the purpose of § 4 of the Clayton Act is flexible. In the absence of a statutory specification of the attributes of business or property,' the courts have spelled out on an ad hoc basis the factual situations that measure up to the required showing of 'business or property' . . . . In determining whether a plaintiff has proved the requisite intention and preparedness, the courts have looked for varying combinations [of several elements] . . ." p. 81.

Some of the elements considered by the courts include the ability of plaintiff to finance the business and to purchase the necessary facilities and equipment, *Waldron v. British Petroleum Co., Ltd., supra;* the consummation of contracts by the plaintiff, *North Texas Producers Association v. Young, supra;* affirmative action by plaintiff to enter the business, *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 2 Cir., 1908, 166 F. 254; *The Washington Professional Basketball Corporation, Inc. v. The National Basketball Association*, S.D.N.Y., 1956, 147 F.Supp. 154; and the background and experience of plaintiff in the prospective business, *Peller v. International Boxing Club, Inc.*, 7 Cir., 1955, 227 F.2d 593, *Rossman v. Pullman Co.*, S.D.N.Y., 1936, 15 F.Supp. 325. Viewing the instant case against these elements, we find that appellant by his own admission had no experience in the operation of a gas plant. He did not have the ability to finance the business, but was hoping to obtain 100% financing from the Bank. He made no investment in facilities or equipment. He had no contract with the Bank, and his sub-option from Jett was a nullity under the Louisiana law. Thus, it seems plain that Martin was unprepared to either enter the new business or to expand his existing

business to include the gasoline plant purchase and operation. He was thus not injured in his business within the meaning of § 4.

We come next to whether he suffered injury to his property. This means that we must first determine whether there was property to be injured. The words business or property are used in the statute in the disjunctive. And whether appellant has property within the meaning of the statute would appear to depend on whether what he possessed was deserving of legal protection. *Waldron v. British Petroleum Co., Ltd., supra.* If property is to be found anywhere in the instant case, it must be found either in Mr. Martin's business relationship with the Bank, or in his sub-option with Jett.

Under the authorities, Martin's inchoate business relationship with the Bank does not qualify as property. *Peller v. International Boxing Club, Inc., supra; Waldron v. British Petroleum Co., Ltd., supra; Brownlee v. Malco Theatres, Inc., supra.* In *Waldron,* the court stated that an advantageous business relationship per se is not sufficiently substantial to amount to a business. The loan application to the Bank does not qualify as property. There was no contract between Martin and the Bank, only a loan application in the progress of negotiation, and there was no obligation under the circumstances from which legal rights and duties might flow.

It is true that Martin had a sub-option from Jett, but it was burdened with infirmities. It was conditioned on the ability to expand the plant to a processing capacity of 40 Mcf of gas per day. The reserves made this impossible although Jett indicated, as stated, that he might have

waived this condition. Jett had not subordinated his net profits interest to the loan payments.

Furthermore, the sub-option expired prior to the first contact between the Bank and Phillips on January 12, 1961. Thus, Martin held only an oral option on immovables after January 10, 1961. Since the properties were located in Louisiana, his sub-option was governed by the Louisiana Statute of Frauds. Article 2440 of the Louisiana Civil Code declares oral contracts of this nature a nullity, not only as to the parties to the contract, but to third persons as well.[6] See *Hoth v. Schmidt*, 220 La. 249, 56 So.2d 412 (1951). Only a valid contract would be property subject to the protection of § 4. *North Texas Producers Association v. Young, supra.*

We conclude that no genuine issue of fact existed as to Mr. Martin's standing to sue. He was not injured in his business or property and thus could not make the showing necessary to obtain relief under § 4. The essence of the case is that Mr. Martin was a finder; he sought to promote his find through Bank financing, and was unsuccessful. The Bank decided not to make the loan. It is true that the Bank, in a sense, gave Mr. Martin's find to Phillips. The remedy for this occurrence if any, is not a suit under the anti-trust laws.

In view of our holding on standing, it is unnecessary to reach the other assignments of error.

AFFIRMED.

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[6] "All sales of immovable property shall be made by authentic act or under private signature. Except as provided in Article 2275, every verbal sale of immovables shall be null, as well as for third persons as for the contracting parties themselves, and the testimonial proof of it shall not be admitted."

United States Court of Appeals

FOR THE FIFTH CIRCUIT

October Term, 1965

No. 22493

D. C. Docket No. 14032—Civil Action

ROBERT H. MARTIN, Appellant,

versus

PHILLIPS PETROLEUM COMPANY, ET AL., Appellees.

Appeal from the United States District Court for the Southern District of Texas.

Before BELL and THORNBERRY, Circuit Judges and FISHER, District Judge.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Southern District of Texas, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered and adjudged that the appellant, Robert H. Martin, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

July 26, 1966

Issued as Mandate: Aug. 17, 1966

APPENDIX B

APPENDIX B

IN THE

UNITED STATES DISTRICT COURT

FOR THE SOUTHERN DISTRICT OF TEXAS

HOUSTON DIVISION

CIVIL ACTION NO. 14,032

ROBERT H. MARTIN, *Plaintiff*

v.

PHILLIPS PETROLEUM CO., ET AL., *Defendants*

January 29, 1965

[1845]

MEMORANDUM:

This case is before the Court on motion by plaintiff, Robert H. Martin, for summary judgment on the issue of liability; and motions by Phillips Petroleum Co., Chemical Bank New York Trust Co., Texas San Juan Oil Corporation, and all other defendants (who play an insignificant role herein), for summary judgment.

The material, undisputed facts in the case are as follows:

1. Prior to November, 1960, George Jett acquired and held an option from the then owners to purchase certain properties, including a plant to extract gasoline and LPG products from wet gas, a pipe line and gathering system, contracts for the purchase of such gas, etc., referred to collectively as the Locust Ridge Plant, in northeastern Louisiana near the Mississippi border. The plant processed wet gas from reserves located in northeastern Louisiana and northwestern Mississippi, sold the natural gasoline and

LPG products extracted therefrom in that area, and disposed of the dry gas outside of the area.

[1846] 2. Prior to November 1960, plaintiff had been interested in the possibility of purchasing the plant, but was unable to do so without extensive financing. In November 1960, while in New York on other business, plaintiff mentioned that fact to Bailey, an officer of defendant Chemical Bank New York Trust Co. (Bank), and inquired whether Bank would be interested in financing the purchase. Coincidentally, at that time Bank controlled Texas San Juan Corporation (Texas San Juan), a corporation engaged in other phases of the oil and gas business, and which had as its principal attraction a substantial tax loss carry-forward. Because of this, Bank expressed an immediate interest in the Locust Ridge Plant, with the thought that with Texas San Juan being used as the vehicle through which the property was acquired, advantage thus might be taken of its tax loss carry-forward.

3. As a result of this initial meeting between plaintiff and Bank, plaintiff intensified his negotiations with Jett, and succeeded in acquiring on December 29, 1960, a [1847] sub-option to buy the Locust Ridge properties for $2,000,000, the option to expire by its terms on January 10, 1961. This was later orally extended by Jett to January 16, 1961, and still later to January 25, 1961.

4. Meanwhile, plaintiff's negotiations with Bank continued. It was contemplated that the loan would be made to Texas San Juan, and title to the propeprties taken in its name. It was also contemplated that after the payout of the loans, Martin and Texas San Juan each would have a 50% interest in the venture, and that Martin would op-

erate the plant. Martin supplied certain technical tests and surveys of the plant, of its reserves and of the availability of gas in the area, etc.

5. On January 10, 1961, Bailey, of Bank, indicated to Martin that he felt the negotiations were progressing satisfactorily, and that he knew of nothing that would interfere with the consummation of the transaction. On the same date, Bailey indicated to Jett that the deal looked good, and that Bank would determine on Monday, January 16, [1848] 1961, whether it would make the loan; and if so, Jett would be paid earnest money of $200,000 on that date.

6. On January 12, 1961, Bailey, of Bank, called an officer of Phillips to discuss the Locust Ridge transaction. A cordial business relationship had existed for several years between Bank and Phillips, and Phillips kept a substantial deposit with Bank. On Friday, January 13, another officer of Phillips called Bailey at Bank to discuss the Locust Ridge transaction further. During the course of this conversation, Bailey inquired whether Phillips would be interested in participating in the transaction, and McCullough, of Phillips, outlined the basis on which Phillips would be interested. The terms, as outlined by McCullough, were (1) that Phillips would operate the plant; (2) would receive the brokerage fees for the sale of its products; and (3) that Phillips would receive a 50% residual interest after payout of the loan. This proposal, obviously, would depose Martin as operator of the plant, and necessarily reduce his [1849] residual interest well below 50%. Both parties to the conversation expressed an interest in pursuing the matter further, and a meeting on January 16, in Houston, was agreed upon.

7. The meeting on January 16 was held in the absence of plaintiff or any representative of plaintiff. In attendance at the meeting were representatives of Phillips, and Bank, and certain parties who had prepared the studies and surveys of the Locust Ridge properties submitted to Bank. These materials, furnished by Martin to Bank, were made available to Phillips. During the late afternoon of that day, Martin came to the meeting and was informed that his original proposal was not acceptable to Bank. He was offered participation in the deal on the basis proposed by Phillips, whereby Martin would have had perhaps a 10% to 20% residual interest.

8. Martin rejected the counter-proposal, withdrew his loan application, requested return of his reports, surveys, etc., and proceeded to seek financing elsewhere. In this he was unsuccessful; and his sub-option, which had [1850] been orally extended by Jett to January 25, 1961, expired unexercised.

9. The defendants approached Jett about dealing with them. A few months later, the purchase of the plant by Texas San Juan was consummated on terms very similar to those proposed by plaintiff, with the exception that Phillips now occupied the position plaintiff would have occupied had the transaction been consummated as plaintiff originally planned.

10. A further fact which may be relevant has to do with the motives which actuated the conduct of Bank and Phillips in the period January 13-16, as result of which Bank agreed to make the loan only on the terms which Phillips suggested. Bank contends that it always was interested in securing an experienced and competent operator

for the plant, and that the plaintiff could not qualify in this particular; that it had made no commitment to plaintiff other than to advise him on January 16 whether it would or would not make the loan upon his terms; that when its decision was reached and announced on that date, plaintiff withdrew his loan application, gathered his documents, and sought financing elsewhere. Bank contends that throughout it was actuated only by legitimate business considerations. The plaintiff contends that both these defendants with their tremendous economic advantages, desired to eliminate or greatly diminish his participation, in order to permit Phillips to secure a dominant position in the market of gasoline and LPG products in the relevant market area; that the purpose, and effect, of inviting Phillips' participation was unreasonably to restrain trade, to create a monopoly, or attempt to do so, and to eliminate him (Martin) as a possible competitor of Phillips in the relevant market area. For present purposes, plaintiff's contentions as to the motives of the defendants, if relevant, must be accepted. It will be considered that Bank, in inviting Phillips into the trade, was doing so to favor an old and cherished customer, with an eye to increased future business; it will be considered that the Bank was not dealing [1852] in good faith with Martin in the period January 13-16; and it will be considered that Phillips was desirous of extending and expanding its influence and participation in the market for the products of the Locust Ridge Plaint.

11. The relevant market area may not be determined with certainty. Plaintiff alleges that an area within a radius of 200 miles of the plant, encompassing parts of northeast Louisiana and northwest Mississippi may appropriately be

considered for this purpose. The defendants make no objection, though they cite figures showing Phillips' participation in the market for various areas.

During the years 1958-1961, Phillips marketed approximately 10-12% of the LPG products in this northwest Mississippi, northeast Louisiana market area, ranking near the bottom among the producers in total production of LPG products. Six or seven other competing companies enjoyed a larger percentage of this market, one such company producing approximately 33% of the LPG products.[1] [1853] The addition of Locust Ridge increased Phillips' nation-wide production by approximately 6/10 of 1%.[2] In the State of Louisiana, Phillips operates two gasoline plants in addition to the one in question.[3] Locust Ridge production is less than 1% of all production within the state.[4] Phillips' total daily Louisiana production (from its three plants) is 124,000 gallons, while a single competitor in the state has a daily production of 1,200,000 gallons. Fourteen competing companies have greater Louisiana production than does Phillips.[5] Phillips has no plant in Mississippi.[6] Plaintiff has not alleged or offered anything tending to show that Phillips' position [1854] in the relevant

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[1] Plaintiff's Brief, p. 191; Defendants' Reply Brief, p. 13.

[2] Plaintiff's original complaint alleged that Phillips produced approximately 100,000 barrels per day of natural gas liquids from 1959 to 1961. The Locust Ridge Plant supplied 560 barrels per day of this total.

[3] The Oil and Gas Journal, March 25, 1963, "1963 Survey of U.S. and Canadian Gas Processing Plants," p. 128, attached as Exhibit 1 to Defendants' Motion for Summary Judgment.

[4] Ibid, pp. 127-130.

[5] Ibid.

[6] Ibid, p. 130.

market area was any greater, due to the acquisition of the Locust Ridge Plant than its relative position in the States of Louisiana or Mississippi.

In his first amended petition, plaintiff alleges that the foregoing facts constitute a violation by defendants of Sections 1 and 2 of the Sherman Act (Title 15, U.S.C. §§1 and 2) and of Sections 3 and 7 of the Clayton Act (Title 15, U.S.C. §§14 and 18), all of which injured plaintiff in his business or property, and entitled him to recover treble damages therefor, under the provisions of Title 15, U.S.C. §15.

The primary purpose of the anti-trust laws is to protect the public from the harmful results of unrestricted limitations on commerce. Standard Oil Co. v. U.S., 221 U.S. 1 (1911). The rights granted to a private litigant by the anti-trust statutes are secondary in purpose, and before there can exist a private cause of action for violation of the Sherman Act, there must be an injury or potential injury to the public welfare, as well as a [1855] private injury. Apex Hosiery Co. v. Leader, 310 U.S. 469 (1940); Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, 90 F.2d 556 (1st Cir. 1937); Riggall v. Washington County Medical Society, 249 F.2d 266 (8th Cir. 1957), cert. den. 355 U.S. 954.

The factors to be considered in determining whether there has been a public injury are the power and ability to control prices, control production, change in the quality or quantity of the goods or services, and the power to exclude competition from the market. U.S. v. E. I. du Pont de Nemours & Co., 351 U.S. 377 (1956); Wm. Filene's Sons Co. v. Fashion Originators' Guild of America, supra; Gam-

co, Inc. v. Providence Fruit and Produce Bldg., Inc., 194 F.2d 484 (1st Cir. 1952), cert. den. 344 U.S. 817. There is no showing of price control, substantial control of production, or a change in the quality or quantity of goods or services in this case. If an unreasonable restraint of trade or monopoly or attempted monopoly in violation of Sections 1 and 2 of the Sherman Act are to be shown, it must be done by showing that the [1856] defendants had and exercised the power to exclude competition from the market to the detriment of the public welfare. Not every act done in combination or conspiracy constitutes an anti-trust violation. One engaged in business has the right to refuse to deal with another for reasons deemed sufficient to itself, so long as that refusal does not produce the prohibited result. U.S. v. Colgate & Co., 250 U.S. 300 (1919); Ace Beer Distributors, Inc. v. Kohn, Inc., 318 F.2d 283 (6th Cir. 1963), cert. den. 375 U.S. 922.

The undisputed facts reveal that Phillips was and remains a minor factor in the relative market area, with only 10-15% of the market. There are several plants in the area owned by various competing companies, many of which are larger producers than Phillips. While the exclusion of one potential competitor from the market undoubtedly may indicate a power to exclude competition in detriment to the public welfare, see e.g. *Gamco, Inc. v. Providence Fruit and Produce Bldg., Inc.*, supra; *Bale v.* [1857] *Glasgow Tobacco Board of Trade, Inc.*, 223 F.Supp. 739 (W.D.Ky. 1963), the facts show that the circumstances peculiar to this transaction combined to exclude Martin. Had the business relationships between Martin and Bank and Bank and Texas San Juan not existed; or had plaintiff chosen to seek financing of the acquisition from some financial institution

other than defendant Bank, the result achieved in the instant case would not have been possible. Clearly neither Phillips, Bank nor Texas San Juan, acting individually or in concert, has the power substantially to lessen or exclude competition in the relevant market area. Their actions did not constitute or produce a restraint of trade, monopoly or attempted monopoly, but simply disappointed the expectations of a potential minor competition in the relevant market area. Defendants' acts did not violate Sections 1 or 2 of the Sherman Act, Title 15, U.S.C. §§ 1 and 2.

Section 3 of the Clayton Act, Title 15, U.S.C., § 14, prohibits any lease, sale or contract for sale of [1858] "goods, wares, merchandise, machinery, supplies, or other commodities," on condition or agreement that the lessee or purchaser will not use or deal in the goods or commodities of a competitor of the lessor or seller, the effect of which may be substantially to lessen competition or tend to create a monopoly. This section is aimed at so-called "tying-agreements," and the gravamen of the offense is that the lease or sale of goods or commodities on condition of agreement produces the prohibited result. McElhenney Co. v. Western Auto Supply Co., 269 F.2d 332 (4th Cir. 1959). Applying the wording of the statute to the fact situation involved, it becomes manifestly evident that the transaction involved does not fall therein. Here Bank attempted to tie the participation of Phillips and its services as operator of the plant to the extension of credit on Martin's behalf. There was no agreement that Martin would not deal with a competitor of Bank. He was entirely free to, and did, seek the financing he desired [1859] elsewhere. There is no suggestion that Bank, Phillips, or any other defendant impeded or interfered with his efforts in

this respect. Plaintiff urges the Court to conclude that the conspiracy between Bank and Phillip to consummate this transaction in some way united them into one entity for the purposes of this statute, so that others in competition with Phillips became competitors of Bank. Plaintiff cites no authority for his proposition, and it seems to put an unnatural strain on the clear import of the statute.

Moreover, it has been held that the rule of *ejusdem generis* requires that the phrase "or other commodities," as used in the statute, be confined to articles of the same kind, class and character as those specifically enumerated. U.S. v. Investors Diversified Services, 102 F. Supp. 645 (D.Minn. 1951). That case further held that a loan of money did not fall within the transactions prohibited by the statute. [1860] Plaintiff alleges, as a violation of Section 7 of the Clayton Act, Title 15 U.S.C. §18, that as a result of the transaction complained of, Phillips acquired the assets of Tensas Gas Gathering Corp. and Gas Industries Management Corp., the result of which may have been substantially to lessen competition or to have tended to create a monopoly. Tensas was the owner of the pipe line system which services the Locust Ridge Plant. Its capital stock, pursuant to agreement among the defendants, was acquired by designee's of the defendants, Newton Edwards and Creigh. Gas Industries operated the Locust Ridge Plant, and its stock was acquired by Texas San Juan. It must be assumed for the purposes of this motion, that by acquiring full control over the operation of the plant and approximately 50% interest therein after pay-out, Phillips acquired assets of the two corporations. May the effect of this be substantially to lessen competition, or may it tend to create a monopoly?

[1861] The purpose of Section 7 was to prevent the creation of trusts, conspiracies and monopolies "in their incipiency and before consummation. . . .". S. Rep. No. 698, 63d Cong., 2d Sess. 1. However, there must be a reasonable probability that the prohibited results will be accomplished; a mere possibility will not suffiice, albeit the use of the word "may" in the statute. U. S. v. E. I. du Point de Nemours & Co., 353 U.S. 586 (1957). The facts clearly show that the acquisition of the Locust Ridge Plant, and as a consequence assets of the two Locust Ridge corporations, did not increase Phillips' minor share of the market to a position of dominance or potential dominance. The Locust Ridge Plant and its attendent facilities are relatively minor factors in the relevant market area. Had Martin instead of Phillips acquired the plant and control over its operations, he would have been a minor competitor in the relevant market area. The acquisition by defendants of these companies did not tend to create a monopoly or substantially to lessen competition.

[1862] After the most exhaustive discovery touching every phase of this controversy, this record falls far short of showing a cause of action for violation of the anti-trust laws. No doubt feeling a sense of outrage at the rather cavalier treatment which he received at the hands of defendant Bank, and with appetite whetted by visions of treble damages, plaintiff has pursued this anti-trust phantom, rather than the more substantial common law claim for interference with contractual negotiations. Counsel advise that such an action, filed contemporaneously with this, is pending in the state court. Plaintiff should look there for relief.

The motion of plaintiff for summary judgment on the issue of liability is denied; and the motions of the several defendants for summary judgment are granted.

Done at Houston, Texas, this 29th day of January, 1965.

BEN C. CONNALLY
United States District Judge

APPENDIX C

SPECIFICATION OF ERRORS

The Court erred in holding, based upon the facts found by the Court and other material record facts as to which there is no genuine issue, that, as a matter of law:

I. The combination and actions of Bank, Phillips and Texas San Juan to substantially take over and replace Martin in the acquisition of the Locust Ridge Properties did not constitute a combination or conspiracy in restraint of trade under Section 1 of the Sherman Act, 15 U.S.C., Section 1, and in failing to hold that said combination and actions did, as a matter of law, constitute such violation of said section.

II. The combination and actions of Bank, Phillips, Texas San Juan and other defendants herein to substantially take over and replace Martin in the acquisition of the Locust Ridge properties did not constitute a boycott of Martin in violation of Section 1 of the Sherman Act, 15 U.S.C., Section 1, and in failing to hold that said combination and actions did, as a matter of law, constitute such violation of said section.

III. The actions of Bank in tying the services of Phillips with its onerous conditions to the granting of its credit to Texas San Juan in Martin's behalf was not a violation of Section 1 of the Sherman Act, 15 U.S.C., Sec. 1, and in failing to hold that, as a matter of law, said actions did constitute such violation of said section.

IV. The acquisition by Phillips, Texas San Juan and other defendants herein of the Locust Ridge properties and the actions of Bank, Phillips and Texas San Juan in connection therewith did not constitute a conspiracy

to monopolize or an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C., Section 2, and in failing to hold that said actions did, as a matter of law, constitute such violation of said section.

V. The acquisition by Phillips of stock and assets of corporations owning and operating portions of the Locust Ridge properties did not vioalate Section 7 of the Clayton Act, 15 U.S.C., Section 18, and in failing to hold that said acquisition did, as a matter of law, constitute such violation of said section.

VI. Phillips, Bank and Texas San Juan, acting in concert, did not have the power to exclude competition from the relevant market area in violation of either Section 1 or 2 of the Sherman Act. 15 U.S.C., Sections 1 and 2, and that their actions with respect to Martin in the acquisition of the Locust Ridge properties did not constitute such action and violation.

VII. The Court erred in holding that defendants' motions for summary judgment should be granted and that of Martin denied because Martin had failed to show an actual or potential injury to the public other than or in addition to, Martin's injury by the combination, conspiracy, boycott, tying and other unlawful activities of defendants of which Martin complained.

VIII. The Court erred in holding that the only factors to be considered in determining the requisite injury under the antitrust laws were the power and ability to control prices, control of production, change in the quality or quantity of goods or services, and the power to exclude competition from the market.

In the alternative to the portions of the foregoing points complaining of the failure of the Court to make certain holdings, appellant will rely upon the following further points:

IX. The Court erred in holding that there were no genuine issues as to the material facts necessary to establish either a combination, a conspiracy, a boycott or a tying arrangement in restraint of trade in violation of Section 1 of the Sherman Act, 15 U.S.C., Section 1.

X. The Court erred in holding that there were no genuine issues as to the material facts necessary to establish a combination or conspiracy to monopolize or an attempt to monopolize in violation of Section 2 of the Sherman Act, 15 U.S.C., Section 2.

XI. The Court erred in holding that there were no genuine issues on the material facts necessary to establish the acquisition by Phillips of stock and assets in Locust Ridge corporations in violation of Section 7 of the Clayton Act, 15 U.S.C., Section 18.

XII. The Court erred in sustaining the objections of Phillips, as reflected by order entered on December 26, 1962, to Plaintiff's Interrogatories I through VII as contained in Plaintiff's Amended Motion to Produce Documents for Inspection, Copying and/or Reproducing.

XIII. The Court erred in sustaining by his order of June 3, 1963, the Objections of Phillips to Second Interrogatories of Plaintiff to Defendant, Phillips Petroleum Company, as such Second Interrogatories were modified by Plaintiff's Reply to Defendant Phillips' Objections to Plaintiff's Second Interrogatories.

XIV. The Court erred by his order of February 27, 1963, in sustaining Bank's motion to quash subpoenas duces tecum directed to Walter M. Ross, George W. Cox, Jr., Joseph A. McFadden, Hulbert S. Aldrich, Clinton C. Johnson, Grenville H. Paynter and Walter V. Shipley as to item 32 thereof and in sustaining the motion in its entirety to quash the subpoena duces tecum directed to Judson L. Anderson.

XV. The Court erred by his order of April 4, 1964, in setting aside its prior order granting leave to orally depose Joseph A. McFadden and directing that witness' deposition be taken on written interrogatories.

XVI. The Court erred by his order of April 21, 1964, in sustaining Phillips' motion to quash the subpoena duces tecum directed to witness E. A. Baldwin.